

UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
Charlotte Division



|                      |   |                                 |
|----------------------|---|---------------------------------|
| IN RE:               | ) | Case No. 02-50491               |
|                      | ) | Chapter 7                       |
| TIMOTHY A. POPE,     | ) |                                 |
|                      | ) |                                 |
| Debtor.              | ) |                                 |
| <hr/>                |   |                                 |
| CAMILLA DAWN HEPLER, | ) | JUDGMENT ENTERED ON MAR 04 2003 |
|                      | ) | Adv. Proc. 02-5022              |
| Plaintiff,           | ) |                                 |
|                      | ) |                                 |
| v.                   | ) |                                 |
|                      | ) | JUDGMENT                        |
| TIMOTHY A. POPE,     | ) |                                 |
|                      | ) |                                 |
| Defendant.           | ) |                                 |
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BASED UPON the Findings of Fact, Legal Conclusions, and Order entered contemporaneously herewith,

IT IS ADJUDGED that the debt owed by the Defendant to the Plaintiff pursuant to the October 2, 2000, Contract of Separation and Property Settlement Agreement (the "Settlement Agreement") is discharged by this bankruptcy case. However, the Defendant's right to collect any proceeds from the sale of the marital residence as provided in the last sentence of paragraph 14(B) of the Settlement Agreement is forfeited.

SO ORDERED.

  
United States Bankruptcy Judge

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| Plaintiff,           | ) |                    |
|                      | ) |                    |
| v.                   | ) |                    |
|                      | ) |                    |
| TIMOTHY A. POPE,     | ) |                    |
|                      | ) |                    |
| Defendant.           | ) |                    |
| <hr/>                |   |                    |

**FINDINGS OF FACT, LEGAL CONCLUSIONS, AND ORDER**

This matter came before the Court on February 18, 2003, upon the Plaintiff, Camilla Dawn Hepler's ("Hepler" or "Plaintiff"), complaint seeking a determination that a debt owed by Defendant Timothy A. Pope ("Pope" or "Debtor") to Hepler pursuant to a Contract of Separation and Property Settlement Agreement is nondischargeable under 11 U.S.C. § 523(a)(15). Based upon the facts presented, this Court finds that Pope has met his burden of establishing by a preponderance of the evidence that the indebtedness to Hepler should be discharged.

**FINDINGS OF FACT**

1. Hepler and Pope were married on November 26, 1993, but separated on May 31, 1999.

2. Subsequent to their separation, Hepler and Pope entered into a Contract of Separation and Property Settlement Agreement (the "Settlement Agreement") on October 2, 2000. Paragraph 14(B) of the Settlement Agreement provides that Hepler and Pope should each be responsible for paying half of the second and third mortgages on the marital residence located at 5485 Brookwood Lane, Hickory, NC 28602.

3. Specifically, the Settlement Agreement provides that "each party shall timely make one half of the monthly payments on each of these two loans owed to First Horizon Equity Lending until the full balance on each loan is paid in full . . . ." The second and third mortgages are both owed to First Horizon Equity Lending, and the approximate balance on the mortgages is \$15,000 and \$12,000, respectively.

4. Pope has made no payments on the second and third mortgages since June 2001. Consequently, Hepler has been forced to make interest payments of approximately \$2,102.00 in order to prevent the indebtedness to First Horizon Equity Lending from becoming delinquent.

5. Pope filed a voluntary Chapter 7 case with this Court on March 16, 2002.

6. Thereafter, on July 3, 2002, Hepler commenced this adversary proceeding to determine the dischargeability of Pope's

indebtedness pursuant to the Separation Agreement under 11 U.S.C. § 523(a)(15) (the "Indebtedness").

#### CONCLUSIONS OF LAW

1. Section 523(a)(15) excepts from discharge debts arising out of a marital dissolution proceeding that are not nondischargeable alimony, maintenance, or support under 11 U.S.C. § 523(a)(5). See *In re Fellner*, 256 B.R. 898 (8th Cir. BAP 2001).

2. In order to except the Indebtedness from discharge, the Plaintiff has the initial burden of showing that the Indebtedness arises from a divorce other than one in the nature of alimony, maintenance, or support. See *id.* The parties stipulated to this fact.

3. The burden then switches to the Debtor to prove either of the defenses under 11 U.S.C. § 523(a)(15) -- his inability to pay the Indebtedness or that the benefit to him of discharging the Indebtedness outweighs the detriment to the Plaintiff if the Indebtedness is discharged. See 11 U.S.C. §§ 523(a)(15)(A) and (B). Because 11 U.S.C. §§ 523(a)(15)(A) and (B) are written in the disjunctive, "[t]he Debtor must meet the showing required on only one of the two prongs of § 523(a)(15) to prevent the debt from being excepted from discharge." See *In re Baker*, 274 B.R. 176 (Bankr.D.S.C. 2000).

4. Here, the Debtor has met his burden of showing that he has the inability to pay the Indebtedness under 11 U.S.C. §

523(a)(15)(A). The Debtor and his current spouse have an income of approximately \$2,000 per month. Their living expenses, even though modest, are slightly more than their current income.

5. Moreover, the Debtor has a limited educational background and no job prospects in the immediate future which would significantly increase his current income. The Debtor was permanently laid off from his job in February 2002, along with several hundred other employees, and he lives in an economically depressed part of the state.

6. Because the Debtor met his burden of showing his inability to pay the Indebtedness, the Court need not consider the balancing of the harms under 11 U.S.C. § 523(a)(15)(B). However, the Court is struck by the equities in this case, which generally weigh in favor of the Plaintiff. She and the Debtor negotiated the terms of a Settlement Agreement pursuant to which the Debtor was to make half of the payments on the second and third mortgages on the marital residence. The Debtor has failed to live up to his end of the bargain, and the Plaintiff, who is single and has suffered economically, is almost in as bad a shape as the Debtor. Currently, she stands to lose her residence. She can not make the mortgage payments and the property, on which the mortgage debts exceed the value, can not be sold.

7. According to the last sentence of paragraph 14(B) of the Settlement Agreement, if the marital residence is sold, the Debtor

is entitled to as much as \$6,000 from the net proceeds of the sale.

8. As a result of his bankruptcy filing, the Debtor's *in personam* liability to First Horizon Equity Lending has been discharged, leaving the Plaintiff solely responsible for making payments on the second and third mortgages and threatening the loss of the property. As a matter of equity, the Debtor's failure to comply with the terms of the Settlement Agreement forfeits his right to collect any proceeds from the future sale of the marital residence.

It is therefore **ORDERED** that:

1. The Debtor's Indebtedness to Hepler shall be discharged from the Debtor's bankruptcy.

2. The Debtor's right to collect any proceeds from the sale of the marital residence as provided in the last sentence of paragraph 14(B) of the Settlement Agreement is forfeited.

This the 30 day of February, 2003.

  
United States Bankruptcy Judge